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**Before the Subcommittee on Crime, Terrorism, and Homeland Security on
“*United States v. Stevens*: The Supreme Court’s Decision Invalidating the Crush
Video Statute”**

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Thank you, Mr. Chairman and Members of the Committee, for inviting me today to testify on the Supreme Court's decision in *United States v. Stevens*. My name is Nate Persily. I am the Charles Keller Beekman Professor of Law and Political Science at Columbia Law School, where I teach courses on Constitutional Law, the First Amendment, and Election Law. My testimony today will focus on explaining the *Stevens* decision and its potential implications for any responsive legislation you might consider.

On April 20, 2010, the Court handed down its decision in *United States v. Stevens*, striking down 18 U.S.C. § 48, which criminalized the creation, sale, or possession of a depiction of animal cruelty if done for commercial gain. Despite the fact that the statute limited itself to a definition of animal cruelty that focused on illegal activity and added exceptions for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. § 48(b), eight members of the Supreme Court (with only Justice Samuel Alito dissenting) found the statute overbroad and considered it a violation of the First Amendment.

I. Summary of *United States v. Stevens*

The Court's opinion, authored by Chief Justice John Roberts, reasoned as follows. First, it rejected the government's argument that depictions of animal cruelty comprise a category of unprotected speech because the societal costs of such speech generally exceed its benefits. Second, opting not to inquire into whether the law had many or even any constitutional applications, the Court concluded that it was, in any case, overbroad. It reached that conclusion by interpreting the law broadly as covering a variety of constitutionally protected forms of expression, such as hunting and agricultural videos. Third, the statute's limit to illegal conduct did more constitutional harm than good, the Court concluded, as it raised the specter of regulated speakers being forced to keep up with the maze of relevant regulations in all fifty states and territories, which prohibited some acts the depictions of which were clearly protected by the First Amendment. Fourth, the statute's exception for speech with "serious value," drawn from the Court's obscenity cases, was both vague and underinclusive of protected expression in this context. Indeed, the Court concluded that some of the non-serious speech regulated by the statute was specifically protected. Finally, while the Court rejected limiting interpretations of the statute that might avoid constitutional difficulty, it left open the question whether a more narrowly drawn statute that targeted crush videos, animal fighting, or other extreme forms of animal cruelty might survive First Amendment scrutiny.

A. Rejection of an Additional Category of Unprotected Speech

The *Stevens* majority had little difficulty in rejecting the government's argument that depictions of animal cruelty represent a category of unprotected speech. *United States v. Stevens*, 559 U.S. ___ (2010), No. 08-769, slip op. at 5-10 (April 20, 2010). It

appeared reluctant to add to the traditional categorical exceptions to the general prohibition on content-based speech regulations, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. Although it did not foreclose the possibility of adding new categories in some future case, it rejected the idea that the way to add such categories would be by evaluating the value of the regulated speech against its societal costs. Slip op. at 7. Such ad hoc balancing threatened core First Amendment interests, the Court concluded.

The majority rejected the government's attempt to analogize depictions of animal cruelty, as a category, to child pornography. Distinguishing its holding in *New York v. Ferber*, 458 U.S. 747 (1982), the *Stevens* Court considered child pornography to be a "special case," one in which the relevant market was "intrinsically related" to the underlying abuse." Slip op. at 8 (citing 458 U.S. at 759). The excision of that category of speech was not the product of a "simple cost-benefit analysis." Slip op. at 8. Rather, child pornography was seen as integral to underlying criminal conduct, the sexual abuse of children, such that the speech at issue had a "proximate link to the crime from which it came." Slip op. at 9 (quoting *Ashcroft v. Free Speech Coalition*, 535, U.S. 234, 249-50 (2002)). Depictions of animal cruelty, broadly defined, did not exhibit the same character.

B. The Overbreadth of 18 U.S.C. § 48

Although *Stevens* raised a traditional facial challenge to the statute, the Court opted instead to analyze his claim as an assertion of facial invalidity due to statutory overbreadth. In other words, instead of focusing on whether the statute had any constitutional applications, the Court adjudicated his claim by asking whether "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Slip op. at 10 (quoting *Washington State Grange v. Washington State Republican Party*, 52 U.S. 442, 449, n.6 (2008) (internal quotation marks omitted)). Overbreadth analysis turns on the reading the Court gives to the statute in that the greater the number of unconstitutional applications captured by the statute as interpreted, the more likely that the statute as a whole is fatally overbroad. Under the Court's reading, many, if not most, of the circumstances in which the statute could be enforced would involve protected speech, and therefore the statute's overbreadth exceeded constitutional bounds. This overbreadth was not cured by the statute's limit to depictions of illegal conduct that did not have serious value.

1. Not Limited to Depictions of "Cruel" Conduct

One reason the statute was overbroad, according to the majority, was its failure to limit itself to depictions of conduct that were, in fact, "cruel." Slip op. at 11. Because the statute included within its regulatory ambit depictions in which animals were "wounded" or "killed," as well as those in which they were "maimed, mutilated or tortured," it could be read as applying to a universe of constitutionally protected expression, such as hunting or agricultural videos, that dwarfed the number of potentially constitutional applications.

Although the statute specifically mentioned “depiction[s] of animal cruelty” as the object to be regulated, its definition of that term did not limit itself to specific acts of cruelty *per se*. Therefore the *Stevens* majority considered the statutory language to be sufficiently capacious to encompass depictions of animal wounding and killing that were not cruel.

2. Insufficient and Overbroad Limitation to “Illegal” Conduct

The statute’s language limiting the reach of the law to depictions of illegal conduct did not help matters. Many state and federal statutes regulate the killing, injuring, or treatment of animals. Conduct that is illegal under such provisions does not necessarily involve cruelty, and depictions of some illegal conduct would be constitutionally protected. The Court refers at various times to laws regarding the protection of endangered species, livestock regulations designed to protect health, and a variety of hunting and fishing regulations. Slip op. at 12-15.

In addition, as read by the Court, the underlying illegal conduct of relevance to the statute was not limited to locations where such conduct was illegal. Rather, the Court viewed the statute as including depictions of conduct that might have been legal at the time and in the location where such conduct was filmed, but was illegal at the time and place where the depictions of such conduct were sold or possessed. Slip op. at 13. Under this reading that the Court accorded the statute, for example, a hunting video legally created in one state could become illegal if sold or possessed for commercial gain in a jurisdiction, such as Washington, D.C., that forbids hunting.

3. Exceptions Clause Did Not Cure Overbreadth

While adopting a broad reading of the statute’s definition of covered speech, the *Stevens* majority adopted a narrow reading of the statute’s exceptions clause. That clause, which gestured toward the Supreme Court’s test for obscenity in *Miller v. California*, 413 U.S. 15 (1973), contained an exception for “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 18 U.S.C. § 48(b). The Court rejected the government’s (and Justice Alito’s) expansive interpretation of the exceptions clause, which would have limited the statute’s reach to crush videos, depictions of animal fighting, and other depictions of extreme animal cruelty. Slip op. at 15-17.

As with its reluctance to expand the categories of unprotected speech beyond those traditionally recognized, the Court’s opinion regarding the statute’s obscenity-like exceptions clause has greater import beyond the specific facts of the *Stevens* case. The Court makes clear that much, if not most, speech lacks “serious” value, especially if the word “‘serious’ should be taken seriously.” Slip op. at 16-17. The standard of “serious value” from the obscenity cases cannot be universalized as a “precondition to protecting *other* types of speech in the first place.” Slip op. at 17 (emphasis in original). Moreover,

the Court recognized that a large share of protected speech lacks any value (let alone serious value) along the lines of the enumerated exceptions. Some constitutionally protected speech, such as hunting or bullfighting videos, is purely recreational in nature, the majority opinion maintained, and was therefore not covered by the exceptions for depictions that have “religious, political, scientific, educational, journalistic, historical, or artistic value.” Slip op. at 16.

II. Implications for Future Legislation

Given the rebuke the Court delivered to the government in *Stevens*, one might view regulation in this area as constitutionally impossible. That may very well be the case, but the decision itself specifically leaves for another day the question whether a more narrowly tailored statute might pass First Amendment scrutiny. As the opinion states: “We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.” Slip op. at 19. For those considering legislative responses to the *Stevens* decision, the Court’s opinion contains more warning signs as to how not to proceed than illustrations of what a constitutional statute would look like.

For example, it is clear from the opinion that hunting and agricultural videos exist as protected expression. Any statute that attempts to regulate depictions of animal cruelty must be limited so as not to include such videos, even despite what the legislative history might reveal. *See* slip op. at 8 (Alito, J., dissenting) (presenting the legislative history that demonstrated the statute was not intended to cover hunting videos). The same might be said for depictions of bullfighting, which both the government and the Court majority appeared to recognize as historically significant enough to merit constitutional protection. Whether *Stevens* allows for narrowly tailored regulations of depictions of other types of illegal animal fighting, such as dog fighting, remains somewhat unclear.

For reasons expressed above, it appears that a broad exceptions clause akin to that used in the context of obscenity will not save an otherwise overbroad law. Some depictions of the wounding or killing of animals, for example, may not have any “serious value,” according to the Court’s decision, apart from their recreational or entertainment value. Nevertheless, such depictions are constitutionally protected. Indeed, it would appear from the decision that statutory language, such as “wounding” or “killing,” as compared to “maiming,” “mutilating” and “torturing,” only invites charges that the statute is overbroad.

Finally, any statute that hinges on the depicted conduct being illegal ought to be mindful of the dangers of relying on the geographically and temporally variant legal regimes concerning the treatment of animals. The *Stevens* decision counsels against reliance on a patchwork quilt of federal, state, territorial and local regulations regarding animal cruelty. A producer, purchaser, or possessor of regulated depictions ought to be on notice that such material is illegal in the jurisdiction of production and possession. Indeed, although the decision does not specifically require that the depicted cruelty to animals be illegal nationwide, the more widespread the condemnation of the depicted

action in law the greater the chance that criminalization of such depictions will be constitutional.

This brings me to the little direction in the *Stevens* opinion as to how, if at all, such depictions could be regulated. The Court seems to highlight the general category of “speech integral to criminal conduct” as a potential avenue for regulation in this area. Slip op. at 6, 8-9. For this proposition, the Court cites and quotes from *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949), a decision upholding a state’s enforcement of its ban on restraints of trade against a union picket and boycott, and *New York v. Ferber*, 458 U.S. 747 (1982), upholding a state ban on possession of child pornography.

Giboney itself is largely inapplicable to the factual context at issue in *Stevens*. However, oft-quoted sentences from the decision have grown to define the field of speech “used as an integral part of conduct in violation of a valid criminal statute.” 336 U.S. at 498. The Court there elaborated that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.” 336 U.S. at 502. Those who would apply *Giboney* in the context of regulation of animal crush videos would argue (as did the government and amici in *Stevens*) that the videotaping of such acts is integral to the criminal acts themselves. In other words, the speech accompanying the conduct is part of the same criminal endeavor: namely, the torture of animals in order to create videos for commercial sale and distribution.¹

While recognizing that *New York v. Ferber* presented a “special case,” the *Stevens* majority read its constitutional rule as an outgrowth of *Giboney*’s categorical exemption for speech integral to criminal conduct. Slip op. at 8-9. As the *Stevens* Court interpreted *Ferber*, “[t]he market for child pornography was ‘intrinsically related’ to the underlying abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation.’” Slip op. at 9 (quoting *Ferber*, 458 U.S. at 759, 761). To regulate the sexual exploitation and abuse of children inherent in child pornography required regulation of the production, distribution, sale, and possession of child pornography. In other words, the “speech” (*i.e.*, the production of the videos) was intertwined with the criminal conduct itself, and regulating it, as well as later distribution and possession, was necessary to target the underlying crime.²

¹ For an excellent summary and critique of the precedent following *Giboney*, see Eugene Volokh, “Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, ‘Situation Altering Utterances,’ and the Uncharted Zones,” 90 *Cornell Law Review* 1277, 1311-26 (2005).

² Professor Volokh points out that not all speech that provides a motive for illegal conduct can be outlawed. See Volokh, *supra* note 1, at 1324-25. He cites as an example, *Bartnicki v. Hopper*, 532 U.S. 514 (2001), which upheld the First Amendment rights of the media to broadcast certain cellular phone conversations illegally intercepted and leaked by a third party. *Bartnicki* also deserves attention because of its elaboration of the meaning of *Ferber*. *Bartnicki* maintained that “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.” 532 U.S. at 529-30. The Court there read *New York v. Ferber* as one of those “rare occasions in which a law suppressing one party’s speech may be justified by an interest in deterring criminal conduct

Justice Alito’s dissent in *Stevens* placed great emphasis on the parallel to *Ferber*. Slip op. at 13-16 (Alito, J. dissenting). As with child pornography, the filmed conduct in both crush videos and dog fighting videos was criminal, he argued, with those who record the conduct likely being criminally culpable as aiders and abettors. Slip Op. at 14, 17 (Alito, J. dissenting). Similarly, combating the underlying crimes required targeting the distribution of the videos. Slip Op. at 13, 17 (Alito, J. dissenting). Finally, the value of the speech was “modest or “*de minimis*” and outweighed by the “evil to be restricted.” Slip Op. at 14, 18 (Alito, J. dissenting) (quoting *Ferber*, 458 U.S. at 762-63).

Whether legislation criminalizing a very narrow class of depictions of animal cruelty, such as crush videos or dog fighting videos, could find safe constitutional harbor in the *Giboney* and *Ferber* precedents is a question *Stevens* leaves open. In multiple ways, child pornography exists as a special exception to general First Amendment principles. Nevertheless, those wishing to criminalize depictions of extreme animal cruelty should pay close attention to the regulatory script set forth in those cases.

The scope of any responsive statute will depend, of course, on the nature and extent of the problem Congress identifies. On those questions concerning the empirics of depictions of animal cruelty, I am thankfully not an expert. With respect to the First Amendment constraints on any such legislation, however, the lesson from the Supreme Court’s recent decision is that such legislation must be precisely targeted and adhere closely to the historic examples the courts have exempted from the normal constitutional restraints on content-based speech regulations.

by another,” and in which “the speech at issue is considered of minimal value.” 532 U.S. at 530 & n.13 (citing *New York v. Ferber*, 458 U.S. 747, 762 (1982)). See also Eugene Volokh, “Crime Severity and Constitutional Line Drawing,” 90 *Virginia Law Review* 1957, 1965-66 (2004) (describing *Ferber* as focused on the gravity of the crime of child sexual abuse, not merely the fact that the underlying conduct was criminal).